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No. 83-1429

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IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 1983

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ALABAMA POWER CO., *et al.*

*Petitioners,*

v.

SIERRA CLUB, *et al.*,

*Respondents.*

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MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE

and

BRIEF OF AMICUS CURIAE THE PROCTER &  
GAMBLE PAPER PRODUCTS COMPANY IN  
SUPPORT OF A PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE DISTRICT OF  
COLUMBIA CIRCUIT

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The Procter & Gamble Paper Products Company (hereinafter "Procter & Gamble") respectfully moves pursuant to Rules 36 and 42 of the Rules of the Supreme Court of the United States for leave to file the attached Brief *Amicus Curiae* in this case.

The written consent of the Petitioners has been obtained and has been filed with the Clerk of this Court. The consent of the Respondents Sierra Club, Natural Resource Defense Council, and the states that participated below on their behalf was requested but has been refused.

Procter & Gamble requests that this motion be granted because the decision by the Court of Appeals invalidating certain of EPA's stack height regulations threaten to adversely affect at least one of the company's manufacturing plants, and the company therefore has a strong interest in the disposition of this case. The company represents

a different type of industrial facility than the parties herein, and believes that the views submitted in the attached brief concerning the impact of the lower court's decision on its efforts to comply with the Clean Air Act will be of assistance to the Court.

Respectfully submitted,

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I.

TABLE OF CONTENTS

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	Page
Table of Contents .....	I
Table of Authorities .....	II
Interest of the Amicus Curiae .....	1
Summary of Argument .....	2
Argument .....	2
Conclusion .....	8

## II.

### TABLE OF AUTHORITIES

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Cases:	Page
<i>Sierra Club, et. al v. EPA</i> , 719 F.2d 436 (D.C. Cir. 1983) .....	1,4
Statutes:	
The Clean Air Act, 42 U.S.C. §7401, <i>et seq.</i> (Supp V 1981)	
§109, 42 U.S.C. §7409 (Supp. V 1981) .....	3
§123, 42 U.S.C. §7423 (Supp. V 1981) .....	<i>passim</i>
Regulations:	
40 C.F.R. §50.4 (1983) .....	5
40 C.F.R. §51.1(z), (ff)-(mm) (1983) .....	2
40 C.F.R. §51.12(j)-(1) (1983) .....	2
40 C.F.R. §51.18(1) (1983) .....	2
Wisconsin Administrative Code, §NR 154.12(7) ..	1
Federal Registers:	
45 Fed. Reg. 67348, <i>et seq.</i> (1980) .....	5
47 Fed. Reg. 5864, <i>et seq.</i> (1982) .....	2

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GAMBLE PAPER PRODUCTS COMPANY IN  
SUPPORT OF A PETITION FOR WRIT  
OF CERTIORARI**

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The Procter & Gamble Paper Products Company ("Procter & Gamble") respectfully submits this Brief as *amicus curiae* in support of the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in *Sierra Club, et al. v. EPA*, 719 F.2d 436 (D.C. Cir. 1983).

**INTEREST OF THE AMICUS CURIAE**

Procter & Gamble produces household consumer paper products such as kitchen towels, and facial and bathroom tissue. One of the Company's plants is subject to emission limits set forth in a state implementation plan<sup>1</sup> which

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<sup>1</sup>Wisconsin Administrative Code, §NR 154.12(7).

was developed by a cooperative effort between local industry and the state and federal regulatory authorities over a period of more than five years. This plan relies in part upon the stack height regulations<sup>2</sup> promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act.<sup>3</sup> Since those regulations were set aside by the court below, that implementation plan is now in jeopardy. If the implementation plan is also eventually set aside, not only will the extensive efforts underlying its development be negated, but the probable cost to the company and other participants in the state implementation plan will be many millions of dollars.

### SUMMARY OF ARGUMENT

In rejecting the "good engineering practice" regulations promulgated by EPA, which regulations reflected a reasonable interpretation of §123 of the Clean Air Act, the Court of Appeals improperly substituted its judgment for that of the EPA. The resulting adverse impact of the decision on industry will be substantial. Industrial facilities face the prospect of being forced to undertake exceedingly costly efforts to reduce air emissions in circumstances where the protection of the public health and welfare has already been assured. As explained hereinafter, Procter & Gamble faces just such a situation, where the decision threatens the continued existence of an effective implementation plan which was developed at great expense over a period of years in compliance with the Clean Air Act. Such a result cannot be justified under the Act.

### ARGUMENT

The decision by the Court of Appeals, if left standing, will significantly and adversely affect numerous industrial

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<sup>2</sup>47 Fed. Reg. 5864 *et seq.* (1982); 40 C.F.R. §§51.1(z), (ff)-(mm), 51.12(j)-(1), and 51.18(1) (1983).

<sup>3</sup>42 U.S.C. §§7401, *et seq.* (Supp. V 1981) (hereinafter referred to as the "Act"). (All further citations will be to the Act, with parallel citations to the U.S. Code given in the Table of Authorities.)

air emission sources throughout the country. While the regulations in question may appear at first blush to be but peripheral technical minutiae, they in fact go to the very heart of the manner in which compliance with the Clean Air Act can be achieved. The subject regulations prescribe how one of the critical variables — stack height — is to be taken into account by the regulatory authorities in establishing limitations for air emission sources. The emission limitations are in turn set at a level to ensure attainment of the federal National Ambient Air Quality Standards ("NAAQS"), which were designed to protect the public health and welfare.<sup>4</sup> When establishing an emission limit for a particular source, the regulatory agency must consider the rate of emissions as well as the location of the point of discharge — or more accurately, the stack height credit calculated pursuant to the subject regulations — in order to ascertain the impact on ambient concentration levels. Since the thrust of the decision by the Court of Appeals is that any such credit must be minimized, many current state implementation plans will have to be revised, with the result that affected industrial sources may have to incur considerable expense to reduce emissions even when current ambient concentration levels pose no threat to the public health and welfare.

Historical engineering practice generally provided that stacks were to be  $2\frac{1}{2}$  times higher than the building height in order to avoid downwash problems. As explained by the Court of Appeals, the response by some companies

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<sup>4</sup>Section 109 of the Act requires the promulgation of national primary ambient air quality standards ("primary standards") and national secondary ambient air quality standards ("secondary standards"). The primary standards are ambient standards "the attainment and maintenance of which in the judgment of the [EPA] Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect public health." §109(b)(1). The secondary standards "shall specify a level of air quality the attainment and maintenance of which . . . is requisite to protect the public welfare . . ." §109(b)(2).



to the Clean Air Act amendments of 1970 was to build stacks taller than historical engineering practice in order to minimize or avoid the need to reduce emissions. *Sierra Club v. EPA*, 719 F.2d 436, 439 (D.C. Cir. 1983). The response by Congress to that practice was provided in 1977 by §123 of the Clean Air Act, prompting the Court of Appeals to correctly conclude that "the entire purpose of the statute was to remedy an abuse that had arisen whereby polluters were building stacks solely to evade Clean Air Act requirements . . . ." *Id.* at 447. However, in sharp contrast to such a limited purpose underlying §123, the expansive reading of that section by the D.C. Circuit imputes to Congress an intent to create a detailed and stringent emission reduction program which 1) places major new administrative burdens on state regulatory agencies, 2) requires the use of fictitious data in calculating and establishing emission limitations, and 3) retroactively threatens or reduces the stack height credit to be given for stacks which were built or raised in accordance with historical engineering practice after 1970. If Congress had in fact intended to create such drastic and fundamental changes, the language employed would certainly have been clearer and more direct than that used in §123.

In rejecting key provisions of EPA's "good engineering practice" (GEP) regulations, the Court of Appeals announced that "two precepts" represented "the heart" of its interpretation of §123: 1) the historical "conservative" engineering rule which EPA had previously embraced — the  $2\frac{1}{4}$  times building height rule — was irrelevant, and 2) EPA must err on the side of reducing stack height. *Id.* at 450. However, neither of these principles finds any persuasive basis of support in the Act or legislative history, and in fact they fly in the face of the statutory command that GEP regulations "insure" against unacceptable downwash. As set forth in Petitioners' brief, the D.C. Circuit in this case substituted its judgment for that

of the EPA, and in so doing, improperly failed to accord adequate weight or deference to the reasonable interpretation of the statute by the agency which was specifically charged with implementing it. The resulting severe, adverse impact of this decision on the states and industry in attempting to comply with the requirements of The Clean Air Act is illustrated by the following case history.

In October 1980, an area in Wisconsin which included the City of Green Bay was designated by EPA as non-attainment<sup>45</sup> for the primary 24-hour NAAQS for sulfur dioxide.<sup>46</sup> However, almost two years prior to that time, Procter & Gamble and five other companies located in the Green Bay area recognized that problem and initiated a voluntary, joint effort to assist the state in the development of a reasonable implementation plan in compliance with the requirements of the Act. This ad hoc industry group retained an environmental consulting firm to conduct the necessary computer modeling to show the anticipated impact of the numerous multi-plant operating variables on the ambient air. The group and its consultant worked closely with the EPA and the state agency, the Wisconsin Department of Natural Resources, to ensure that the resulting plan met all federal and state requirements. The implementation plan which ultimately resulted from this effort was shown to be capable of achieving the applicable ambient standard primarily as a result of commitments by the group members to use lower sulfur content fuel and, for certain facilities, to build new "good engineering practice" height stacks in accordance with the EPA regulations at issue here. In December 1983, this implementation plan was adopted by the State of Wisconsin<sup>47</sup> and has been forwarded to EPA for its approval.

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<sup>45</sup>45 Fed. Reg. 67348 *et seq.* (Oct. 10, 1980).

<sup>46</sup>40 C.F.R. 150.4 (1983).

<sup>47</sup>See footnote 1 and accompanying text.

The work which went into the development of the so-called Green Bay sulfur dioxide implementation plan has been informally acknowledged by EPA as representing one of the most comprehensive and exhaustive efforts to date in the development of a state implementation plan. It is estimated that the total expenditure by the industry group for developing its plan was about \$1 million. The cost for the consultant's modeling work alone exceeded \$500,000. In addition, an enormous amount of time and effort was devoted by representatives from both the regulatory agencies and industry toward the end of bringing the quality of air in Green Bay into compliance with the standards of the Clean Air Act.

The results of this successful effort are now in jeopardy because of the ruling by the D.C. Circuit. By casting aside the traditional engineering concept of "GEP" stack height that had been applied by both industry and regulatory agencies in this effort, the lower court's decision could require reformulation of the requirements of this plan based on false stack height assumptions. The time, effort and money spent by industry and the various governmental agencies over the past five years may now have to be totally discarded.

The disruption and confusion injected into the air quality planning process by the lower court's decision provides no commensurate benefit in terms of furthering the statutory goal of protecting public health. The Green Bay plan which the industry group helped develop will attain the primary NAAQS, which, by definition, means that the protection of public health in Green Bay is assured.\* Since that area is now projected to be attainment for sulfur dioxide as a result of the current implementation plan, there is simply no reason why that plan

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\*See footnote 4.

should be changed or revised except for the excessively broad reading of the Act by the D.C. Circuit.

If the ruling below requires that the sulfur dioxide issue be reopened in Green Bay, there will almost certainly be severe economic consequences to that community. During the course of developing the current plan, the estimated compliance costs for the six affected companies over a seven year period was \$52 million. If stack height must now be assumed to be lower than it is in reality, substantial additional control measures could be required.

In order to develop some insight into the potential magnitude of these costs, it is useful to refer to an alternative plan that was considered at the same time the existing plan was developed. This alternative would have involved additional emission controls, including scrubbing by at least one of the affected facilities. The added, or incremental, cost to the group of this alternative control plan was estimated by the industry group to require expenditures of slightly more than \$26 million annually. According to an economic consultant retained by the industry group, National Economic Research Associates, Inc. (NERA), this cost differential translated to a reduced rate of employment growth in the Green Bay area in future years. NERA also confirmed that the voluntarily-developed plan which has now been adopted is the most cost effective plan available. The alternative plan which would increase the costs of the six companies to do business in Green Bay by millions of dollars per year would constitute a significant and unwarranted economic penalty, based solely on the requirement that these facilities assume a false stack height in air quality modeling analysis. This result would serve no public health or welfare objective, and cannot be justified under the Clean Air Act.

**CONCLUSION**

For the reasons stated, the Petition for Certiorari should be granted.

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